

**UNITED STATES' RESPONSE TO DEFENDANTS QUORUM HEALTH GROUP'S
AND QUORUM HEALTH RESOURCES' RULE 21 MOTION TO SEVER**

The United States of America ("United States" or "the government") acquiesces to the motion of defendants Quorum Health Group, Inc. and Quorum Health Resources, LLC (collectively "Quorum") to sever certain claims from this litigation. The United States believes a response to that motion is necessary, however, to clarify exactly what claims ought to be severed and why severing those claims is within this Court's discretion.

The United States believes that all claims alleging liability by Defendants Columbia/HCA Healthcare Corporation and HealthTrust-The Hospital Company, collectively referred to as "Columbia/HCA," and by hospitals owned or managed by them should be severed from this litigation. These claims assert liability under the False Claims Act, 31 U.S.C. § 3729 *et seq.*, and common law or equitable theories of fraud, recoupment, unjust enrichment, and payment under mistake of fact. The remaining claims not to be severed assert liability under the same theories by defendants Quorum Health Group, Quorum Health Resources, and their subsidiaries, collectively "Quorum", and by HCA Management Company, Quorum Health Resources' predecessor corporation, as well as asserting liability against hospitals owned or managed by Quorum or HCA Management Company.

The United States believes that severance is appropriate to avoid having active litigation interfere with the United States' ongoing criminal investigation of, and settlement discussions with, Columbia/HCA. As discussed more fully below, the United States does not believe that any defendant was misjoined to this litigation, nor that any potential negative taint

to Quorum's image from such joinder necessitates severance. Further, the United States does not believe that severance will necessarily lead to a quicker resolution of claims against Quorum. The United States believes there is a good chance that all claims against Columbia/HCA will be resolved through informal settlement discussions, much more rapidly than the delays inherent in civil litigation. The government requested Quorum's participation in such informal settlement processes, a request Quorum denied.

I. Factual Background

The relator, James F. Alderson, ("relator") filed the instant *qui tam* action in 1993¹ under the provisions of the False Claims Act, 31 U.S.C. § 3729, *et seq.* ("FCA") against Hospital Corporation of America ("HCA"), HCA Management Company, HealthTrust-The Hospital Company ("HealthTrust"), Quorum Health Group and its subsidiary Quorum Health Resources Inc., and all hospitals managed or owned by all defendants since January 1, 1985.² Quorum and HealthTrust were formerly a part of HCA, until they spun off from HCA in 1989 and 1987 respectively. HCA Management Company became Quorum Health Resources Inc. in 1989. *See* Quorum's Rule 21 Motion at 4. Since the filing of this lawsuit in 1993 Columbia Healthcare Corporation acquired two of the named defendants, HCA in 1994 and HealthTrust in 1995, and changed its name to Columbia/HCA Healthcare Corporation.

Relator has alleged that the defendants submitted false claims to Medicare, Medicaid

¹Relator filed this *qui tam* action in the United States District Court for the District of Montana. Relator moved for a change of venue to the United States District Court for the Middle District of Florida in 1997.

²This date was changed to January 1, 1984 in an amended complaint.

and the Civilian Health and Medical Program of Uniformed Services ("CHAMPUS")³ since at least 1984. Specifically, relator alleges, *inter alia*, that Defendants knowingly made false statements on Medicare and Medicaid cost reports regarding the following matters: 1) capital-related costs (*e.g.*, lease payments, home office capital related costs); 2) interest expenses (*e.g.*, bond discounts, debt cancellation costs, expenses incurred in issuing bonds, bond trustee operating fees); and 3) depreciation and non-allowable costs (*e.g.*, personal comfort items, physician recruitment and dues, advertising and marketing expenses, property, franchise and other taxes). In addition, relator alleges that Defendants submitted claims for reimbursement to the government knowing that they were fraudulent, and kept a set of accounting records known as "reserve" cost reports that demonstrated such knowledge.

The United States intervened in this action on October 1, 1998, pursuant to 31 U.S.C § 3730(b)(4)(A), and has taken over responsibility for litigating the case. Under Federal Rule of Civil Procedure 4(m) the United States' complaint must be served on the defendants by today, February 2, 1999. Despite not having yet been served with the United States' complaint Quorum filed two motions with the court on January 19, 1999. Specifically, Quorum filed motions to sever claims against Columbia/HCA from the remaining claims (the "Rule 21 Motion"), and requesting the court to appoint a mediator pursuant to Chapter 9 of the Local Rules (the "Mediation Motion"). The United States today is filing its Application for a Stay of Civil Proceedings against defendants Columbia/HCA and HealthTrust (the

³CHAMPUS provides health benefits to members of the military, military retirees, and their dependents. The program is now referred to as TRICARE.

“Application for a Stay”), which Columbia/HCA and HealthTrust did not oppose, and a joint stipulation, with defendants Columbia/HCA and HealthTrust, for an extension of the time prescribed by Federal Rule of Civil Procedure 4(m) to serve Columbia/HCA and HealthTrust with the United States' complaint. Today the United States also files responses to Quorum's two motions, and its Complaint.

As more fully discussed in the United States' Application for a Stay and the declarations supporting that Application, filed under seal, of Vanessa I. Green and Robert T. Monk, the United States is actively pursuing a national criminal cost report fraud investigation, and is actively engaged in negotiations with Columbia/HCA to settle Columbia/HCA's potential civil, criminal, and administrative liabilities to the United States. The United States proposed a nonlitigative methodology to attempt to settle this case to Quorum as well. (The details of these discussions are more fully described in the United States' Memorandum in Opposition to Defendants Quorum Health Group's and Quorum Health Resources' Motion for the Appointment of a Mediator Pursuant to Chapter Nine of the Local Rules, also filed with the Court today.) To date Quorum has declined to enter serious settlement negotiations.

II. Severance Under Rule 21 is Appropriate in this Litigation, But Not for the Reasons Proffered by Quorum.

A. Severance is needed because Quorum refused to consent to a stay.

Quorum's motion to sever this case is based on the faulty premise that the severance of allegations relating to Quorum and its managed hospitals from those relating to Columbia/HCA is the ideal direction for this litigation to take. Little could be further from the

truth; the United States believes that severance is a distant second best. As Quorum acknowledges, *see* its Rule 21 Motion at 3, the United States believed and believes that this case should be stayed, because all claims in the matter are related and proceeding at this point may well interfere with the ongoing criminal investigation of, and settlement negotiations with, Columbia/HCA.

Quorum did not agree to such a stay, however. It was not obligated to engage in serious settlement negotiations, which the United States hoped would obviate the need to proceed formally with this litigation. Given Quorum's refusal to consent to a stay or to enter constructive settlement negotiations the United States chose not to seek a stay of its claims against Quorum or its managed hospitals. *Cf.* Local Rule 3.01(g). It further decided that the best remaining option to protect the integrity of the criminal investigation of, and settlement process with, Columbia/HCA was not to oppose severance of its claims against Columbia/HCA from all remaining claims. The United States does not, however, believe that absent Quorum's refusal to consent to a stay severance would be appropriate, given the interrelated nature of all allegations in the relator's complaint. The Federal Rules do not require such a massive waste of judicial resources.

B. Rule 21 allows the Court to order the requested severance.

Federal Rule of Civil Procedure 21 provides that “any claim against a party may be severed and proceeded with separately.” Unlike under Rules 20(b) and 42(b), which allow for separate trials in one case, severance under Rule 21 leads to the creation of a new lawsuit, with its own docket number. *See, e.g., United States v. O’Neil*, 709 F.2d 361, 368 (5th Cir.

1983) ("Severance under Rule 21 creates two separate actions or suits where previously there was but one."); *Grayson v. K-Mart Corp.*, 849 F. Supp. 785, 792-93 (N.D. Ga. 1994).

While Rule 21 is entitled "Misjoinder and Non-Joinder of Parties," it is incontrovertible that severance under the last sentence of Rule 21 is acceptable for reasons other than mis- or non-joinder. *O'Neil*, 709 F.2d at 369; *Spencer, White & Prentiss Inc. of Conn. v. Pfizer Inc.*, 498 F.2d 358, 361 (2d Cir. 1974); *Henderson v. AT&T Corp.*, 918 F. Supp. 1059, 1061-62 (S.D. Tex. 1996); Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 1689 at 478-79 (1986 & Supp. 1998). Rather, severance is allowed, in the discretion of the district court, *see Brunet v. United Gas Pipeline Co.*, 15 F.3d 500, 505 (5th Cir. 1994); Wright, Miller & Kane, § 1689 at 477, whenever the interests of justice so require. *Cf. Henderson*, 918 F. Supp. at 1063-64; *American Fidelity Fire Ins. Co. v. Construcciones Werl, Inc.*, 407 F. Supp 164 (D.V.I. 1975); Wright, Miller & Kane, § 1689 at 47.

The United States believes severance is required for two related reasons, one articulated by Quorum and one it does not proffer. First, as stated above and discussed more fully in the United States' Application for a Stay, the United States desires to preclude any interference by this matter with the United States' ongoing criminal investigation of cost report fraud. Second, the United States agrees with Quorum that, because Quorum did not consent to a stay, severance is necessary to prevent continued delay in the commencement of formal litigation against Quorum. Severance is the best means to escape what otherwise would be a Hobson's choice, between staying litigation against both Columbia/HCA and

Quorum or staying it against neither.

C. Quorum's motion requesting severance relies on inappropriate grounds for such relief.

Quorum argues four somewhat overlapping reasons to support its motion to sever. First, it argues that severance is needed to prevent continued delay. Quorum actually argues that two distinct types of delay warrant severance — delay prior to the commencement of formal litigation by the United States and delay prior to the eventual resolution of this matter. Third, Quorum argues that it is prejudiced from the public opprobrium resulting from being the co-defendant in a civil matter with a defendant also subject to a publicly disclosed criminal investigation. Finally, Quorum argues that rather than being within the discretion of the Court severance is mandatory because the named defendants ought never have been joined under Federal Rule of Civil Procedure 20(a) in the first place. The United States believes that of these reasons only avoiding delay prior to the commencement of formal litigation is a valid justification for severance.

First, while the United States acknowledges that litigation must proceed immediately against Quorum, since Quorum did not consent to a stay, the government questions whether the case against Quorum will be resolved more rapidly than that against Columbia/HCA, *see* Quorum's Rule 21 Motion at 10, since the litigation against Quorum, while formally commencing earlier, very well may be significantly more drawn out than informal settlement negotiations might have been. Had Quorum agreed to discuss seriously routes towards settling this matter the United States believes staying formal litigation would likely have significantly shortened its eventual length.

Second, while defendants in civil and especially criminal litigation routinely request severance from codefendants perceived to be “more culpable,” such severance is rare, *cf. United States v. Baker*, 10 F.3d 1374, 1388 (9th Cir. 1993) (“the fact that a defendant is to be tried with a more culpable defendant [is not] enough to require severance.”); *United States v. Youngpeter*, 986 F.2d 349, 363 (10th Cir. 1993) (“It would be normal and usual to assume one of two or more co-defendants would be more or less culpable than the others.”), and certainly not warranted here. Many factors affect the decision whether to proceed against a defendant civilly, criminally, or both, factors which may not correlate at all with culpability. Furthermore, were such severances to be granted it would needlessly clutter the courts with duplicative litigation based on the same transactions or occurrences, greatly increasing the burdens placed on the courts.

Third, the various defendants to this litigation, joined originally by the relator, are not misjoined under Federal Rule of Civil Procedure 20(a). Rule 20(a) allows the joinder of multiple parties where the underlying claims “aris[e] out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action.” These two requirements must each be met. *Coughlin v. Rogers*, 130 F.3d 1348, 1351 (9th Cir. 1997). So long as joinder of the parties is permissible for *any one claim*, though, a plaintiff may then rely on Rule 18 to add as many additional claims against one or more of the defendants as the plaintiff sees fit. *See Wright, Miller & Kane*, § 1655 at 393 (“If the requirements for joinder of parties have been satisfied, ... Rule 18 may be invoked independently to permit plaintiff to join as many other claims as he has against

the multiple defendants or any combination of them, even though the additional claims do not involve common questions of law or fact and arise from unrelated transactions."); *Intercon Research Assoc., Ltd. v. Dresser Indus., Inc.*, 696 F.2d 53, 57 (7th Cir. 1982).

Quorum does not dispute that common questions of law or fact are present in this litigation; it argues solely that no "transaction, occurrence, or series of transactions or occurrences" is sufficiently present to justify joinder. This argument is, at best, frivolous. The United States does not claim — nor does it need to claim — that all parts of this litigation involve one specific transaction or occurrence. One of the standard justifications for joinder, however, is where it is unclear who is the most appropriate defendant to a claim. *See United States v. Tri-State Design Constr. Co.*, 899 F. Supp. 916, 918-19 (N.D.N.Y. 1995); Wright, Miller & Kane, § 1654 at 391; James Moore, Moore's Federal Practice 3d § 20-09. This case is rooted in policies devised by HCA, which the United States asserts resulted in fraudulent overbillings to the government. Various corporations that were part of HCA between 1984 and 1989 were joined as defendants, in litigation covering the period beginning in 1984. It was not until 1989 that Quorum Health Group or any of its corporate subsidiaries were incorporated. Quorum has asserted that it is liable for the entire period covered by this litigation for any potential recovery derived from hospitals now part of it and for any wrongdoing by HCA Management Company, but the United States has yet to receive adequate assurances thereof. Responsibility for HCA Management Company's liabilities from its management of hospitals between 1984 and 1989 could lie either with Columbia/HCA, the successor corporation to the company that sold HCA Management Company, or with

Quorum, depending on the exact details of that transaction. The United States would therefore be well within its rights to oppose severance to allow continued joint and several liability by the various defendants. It is certainly not so hamstrung by Rule 20 as to forbid it to sue HCA's corporate successors for liability "jointly, severally, or in the alternative," Rule 20(a), for a series of common transactions designed by HCA.

Furthermore, Quorum's argument reads the phrase "*series* of transactions or occurrences" out of Rule 20(a). At issue in this case is a pattern or practice repeated multiple times by a set of intertwined defendants, involving over 400 hospitals and 15 years. Under Quorum's logic the government might have to file over one hundred individual lawsuits to adequately recover for the defendants' fraud. It is because of the alleged series of fraudulent submissions, the repeated pattern of flouting the rules governing Medicare reimbursement, however, that the government may if it wishes join together the hospitals managed by Quorum. The gravamen of this action is a pattern and practice of fraudulent behavior, and Quorum's arguments otherwise are incorrect. *Cf. Grayson*, 849 F. Supp. at 789 (where plaintiffs had no support in the record for assertions that centralized company policies led directly to individual wrongful acts joinder was invalid).

III. Conclusion

The United States therefore acquiesces to the motion to sever filed by defendants Quorum Health Group, Inc. and Quorum Health Resources, LLC, but requests the Court to make explicit exactly which claims are to be severed (all claims against Columbia/HCA Healthcare Corporation and HealthTrust-The Hospital Company, except insofar as any such

claims derive from HCA Management Company), and not to rely on three of the four factors argued by Quorum to support severance.

Respectfully submitted,

DAVID W. OGDEN
Acting Assistant Attorney General

CHARLES R. WILSON
United States Attorney

JAY G. TREZEVANT
Assistant United States Attorney
Florida Bar No. 802093
400 N. Tampa Street
Suite 3200
Tampa, Florida 33602
Telephone: 813/ 274-6076
Fax: 813/ 274-6198

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MICHAEL F. HERTZ
JOYCE R. BRANDA
MARIE V. O'CONNELL
VANESSA I. GREEN
DAVID M. GOSSETT
Attorneys, Civil Division
U.S. Department of Justice
P.O. Box 261
Ben Franklin Station
Washington, D.C. 20044
Telephone: 202/ 616-8132
Fax: 202/ 616-3085